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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/825,445	04/15/2004	Cheng Shen	SP-1281	8324
44388	7590	09/26/2005	EXAMINER	
SOLAE, LLC P. O. BOX 88940 ST. LOUIS, MO 63188			WEIER, ANTHONY J	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 09/26/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/825,445

Applicant(s)

SHEN ET AL.

Examiner

Anthony Weier

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-59 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-59 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1- 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over by Shen (U.S. Patent Application No. US 20040258827) taken together with Kent et al; .

The applied reference has a common inventor with the instant application.

Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(I)(1) and § 706.02(I)(2).

Shen discloses a process of producing an acidic beverage comprising a blend of a hydrated protein stabilizing agent (e.g. pectin) with acid (e.g. ascorbic) to provide a first component with a pH of 2-5.5 with a hydrated protein material (e.g. hydrolyzed soy protein isolate) having a solids content of up to 10% which has been homogenized using a two stage process (1500-5000 psi and 300-1000 psi) wherein the blend of same is then pasteurized (195 F for 60 seconds) and homogenized under a two-stage process, said blend having a pH as called for (e.g. pH 3.8), wherein said blend having the particular ratios of the various components as called for in the instant claims (see paragraphs 28, 34, and 38-43). Shen further discloses an embodiment of the aforementioned process wherein prior to blending a portion of the hydrated protein stabilizing agent is added to the hydrated protein material and the other portion is combined with acid (see paragraph 46).

The claims differ in that the pasteurizing and homogenizing of the blend is carried out at 8000-30000 pounds psi and then 300-1000 psi. However, it is well known to employ homogenization in a two stage system to facilitate increased particle reduction as taught, for example, by Kent et al (15,000 and under 1000, e.g. 999 psi; col. 3). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such high homogenization pressures as claimed as a result effective variable depending on the particular aesthetics desired in the final beverage product.

3. Claims 1- 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over by Wong et al (U.S. Patent Application No. US 2005020147) taken together with Kent et al.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(I)(1) and § 706.02(I)(2).

Wong et al discloses a process of producing an acidic beverage comprising a blend of a hydrated protein stabilizing agent (e.g. pectin) with acid (e.g. ascorbic) to provide a first component with a hydrated protein material (e.g. hydrolyzed soy protein isolate) having a solids content of up to 10% wherein the blend of same is then pasteurized (195 F for 60 seconds) and homogenized under a two-stage process, said blend having a pH as called for (e.g. pH 3.8), wherein said blend having the particular ratios of the various components as called for in the instant claims (see paragraphs 1 and 89-101).

The claims differ in that the pasteurizing and homogenizing of the blend is carried out at 8000-30000 pounds psi and then 300-1000 psi. However, it is well known to employ homogenization in a two stage system to facilitate increased particle reduction as taught, for example, by Kent et al (15,000 and under 1000, e.g. 999 psi; col. 3). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such high homogenization pressures as claimed as a result effective variable depending on the particular aesthetics desired in the final beverage product.

Wong et al is silent regarding the pH of the combination of the hydrated protein stabilizing agent and acid. However, such determination would have been well within the purview of a skilled artisan, and, absent a showing of unexpected results, it would have been further obvious to have arrived at such pH value as a matter of preference.

Wong et al is further silent regarding the addition of the stabilizing agent to the acid and to the hydrated protein material before blending both entities. However, it is not seen where separating the addition of said stabilizing agent would make for a patentable distinction since the final product would carry the same composition. Absent a showing of unexpected results, it would have been further obvious to have divided the stability agent between the acid and hydrated protein material prior to blending all of the ingredients as a matter of preference.

#### ***Double Patenting***

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11

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F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-59 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-53 of copending Application No. 10/462894 in view of Kent et al.

This is a provisional obviousness-type double patenting rejection.

The claims differ in that the pasteurizing and homogenizing of the blend is carried out at 8000-30000 pounds psi and then 300-1000 psi. However, it is well known to employ homogenization in a two stage system to facilitate increased particle reduction as taught, for example, by Kent et al (15,000 and under 1000, e.g. 999 psi; col. 3). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such high homogenization pressures as claimed as a result effective variable depending on the particular aesthetics desired in the final beverage product.

The claims also differ regarding the addition of the stabilizing agent to the acid and to the hydrated protein material before blending both entities. However, it is not seen where separating the addition of said stabilizing agent would make for a patentable distinction since the final product would carry the same composition. Absent

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a showing of unexpected results, it would have been further obvious to have divided the stability agent between the acid and hydrated protein material prior to blending all of the ingredients as a matter of preference.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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Anthony Weier  
September 21, 2005

Anthony Weier  
Primary Examiner  
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9/21/05